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81-2186
No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

M. R. YUDOFSKY & ASSOCIATES, a Kentucky Partnership, and
MORRIS R. YUDOFSKY & ASSOCIATES, another Kentucky Partnership, - - Petitioners,

versus

COMMONWEALTH OF KENTUCKY, DEPARTMENT OF FINANCE, - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

EDWIN L. COHEN
COHEN & COHEN
335 West Market Street
Louisville, Kentucky 40202
(502) 584-8177
Counsel for Petitioners

May 25, 1982

WESTERFIELD-BONTE CO., 618 W. KENTUCKY—P.O. BOX 6251, LOUISVILLE, KY.

QUESTIONS PRESENTED FOR REVIEW

Where the Commonwealth of Kentucky allowed a private developer, as a condition precedent to the developer's proceeding with his own private project, to select Petitioner's and other's property as the site for a state garage and office building, which selected site:

(1) Was contrary to that recommended by the State commissioned expert study for location of state parking garage;

(2) Was contrary to that recommended by the State commissioned expert study for the location of a state office building;

(3) Was not blighted nor deteriorated, and the State never contended that it was, and

(4) Was selected in order to provide a straight line pedway from the private developer's new project to the State owned Commonwealth Convention Center:

Was the taking for a public use?

Petitioners say NO and that this "deal" between the Commonwealth of Kentucky and the private developer deprived the Petitioners of their property without due process of law.

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v.

COMMONWEALTH OF KENTUCKY, DEPARTMENT OF FINANCE, - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The Petitioners, M. R. Yudofsky & Associates, a Kentucky Partnership, and Morris R. Yudofsky & Associates, another Kentucky Partnership, respectfully pray that a Writ of Certiorari issue to review the Opinion of the Court of Appeals of Kentucky rendered on September 4, 1981.

OPINIONS BELOW

The Opinion of the Court of Appeals of Kentucky (not to be published) appears in the Appendix hereto. The Findings of Fact and Conclusions of Law rendered by the Jefferson Circuit Court also appears in the Appendix hereto.

JURISDICTION

The Judgment of the Jefferson Circuit Court taking the three story building owned by Petitioner was entered on December 10, 1979, and amended and modified on December 17, 1979. The Judgment taking the ten story office building owned by the other Petitioner was entered January 21, 1980, and amended and modified on November 20, 1980. The two cases were consolidated at the Kentucky Court of Appeals; and on September 4, 1981, the Opinion of the Court of Appeals was rendered. A timely petition for rehearing was denied on November 25, 1981. A timely Motion for Discretionary Review was denied by the Supreme Court of Kentucky on March 2, 1982. This Court's jurisdiction is invoked under *28 USC 1257*.

Appeal is permissible where the ruling is fundamental to the future conduct of the case. *Forgay* v. *Conrad,* 6 How. 201, 204, 47 U. S. 201, 204, 12 L. Ed. 404 (1848).

> And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further

decree the accounts between the parties pursuant to the decree passed.

In accord is *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 136, 46 S. Ct. 52, 70 L. Ed. 195 (1925).

The Judgment was final on the question of power to take in Kentucky, *Ratliff* v. *Fiscal Court of Caldwell County*, Ky., 617 S. W. 2d 36, 39 (1981).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution:

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, § 1, to the Constitution:

AMENDMENT 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

KENTUCKY STATUTES INVOLVED

KRS 247.140:

247.140 Functions of Fair Board

(1) The state fair board:

(a) Shall have the custody and control of such property as now is under its custody and control, and of such property as may hereafter be placed under its control or transferred to it by the state property and buildings commission, for any purposes mentioned in this section and the physical properties so under its custody and control or transferred to it are hereinafter referred to in this section, and in KRS 247.150 and 247.160, as the "state fairgrounds and an area in a city of the first class to be used as an exhibition center."

(b) May erect and repair buildings on the state fairgrounds and exhibition center, make any and all necessary or proper improvements, and generally carry on a program of development and extension of facilities designed to accomplish the objects defined in this section.

(c) Shall promote the progress of the state and stimulate public interest in the advantages and development of the state by providing the facilities of the state fairgrounds for agricultural and in-

dustrial exhibitions, public gatherings, cultural activities, and other functions calculated to advance the educational, physical and cultural interests of the public and by providing the facilities of the exhibition center for conventions, trade shows, public gatherings and other functions calculated to advance and enhance the visitor industry, economy, entertainment, cultural and educational interests of the public.

(d) May hold an annual fair on the state fairgrounds, for the exhibition of agricultural, mechanical, horticultural, dairy, forestry, poultry, livestock, mineral, and all other industrial interests of the state, and prepare premium lists and establish rules of exhibition for the fair.

(e) May purchase liability insurance for the members and executive officers exempted from the classified service of the state by KRS 18.140.

(2) The state fair board may take, acquire and hold property, and all interest therein, by deed, gift, devise, bequest, lease, or eminent domain, or by transfer from the state property and buildings commission, and may dispose of any property so acquired in the manner provided by law. In the exercise of its power of eminent domain it shall proceed in the manner provided in the Eminent Domain Act of Kentucky.

KRS 177.081:

177.081 Authority of bureau of highways to condemn land and materials; title to property; conclusiveness of official order

(1) The Commonwealth of Kentucky, bureau of highways, when it has, by official order, desig-

nated the route, location or relocation of a highway, limited access highway, bridge, roadside park, borrow-pit, quarry, garage or other property or structure deemed necessary for the construction, reconstruction, or maintenance of an adequate system of highways, may, if unable to contract or agree with the owner or owners thereof, condemn the lands or material, or the use and occupancy of the lands designated as necessary. All property acquired by the Commonwealth of Kentucky, bureau of highways, shall be in fee simple whenever so specified in the petition filed in the action. The official order of the bureau of highways shall be conclusive of the public use of the condemned property and the condemnor's decision as to the necessity for taking the property will not be disturbed in the absence of fraud, bad faith, or abuse of discretion.

(2) The proceedings for condemnation shall be as provided in the Eminent Domain Act of Kentucky.

STATEMENT OF THE CASE

In 1977 the Commonwealth of Kentucky built a convention center in Louisville, Kentucky, which faces Fourth Street and extends from the south side of Market Street to the north side of Jefferson Street. In 1978 a Hyatt Hotel was constructed to the south on Fourth Street from the south side of Jefferson Street to the north side of Liberty Street and connected to the Commonwealth Convention Center by an elevated pedway across Jefferson Street. Only the site selected by

the private developer on Petitioners' property would accommodate a straight line pedway from his new hotel to the Commonwealth Convention Center and establish parity of pedways with the Hyatt Hotel. See Petitioners' diagram, Appendix.

Petitioners are Kentucky partnerships which respectively own a three story storefront and a ten story office building on the northeast corner of Fourth and Market Streets, Louisville, Kentucky. These properties are not blighted or deteriorated and were not a part of the Riverfront Development Project, Kentucky R. 19 (Tr. 113-114, qs. 30-36).

The Commonwealth of Kentucky, acting through its then governor, Julian M. Carroll, made an agreement with local developer, Al J. Schneider (Galt House, Inc.), that if Schneider would buy the Urban Renewal land at Fourth and Main Streets and build a new hotel complex (Riverfront, aka Shippingport Square), that the State in return would build a parking garage on a site selected by Schneider with a straight line pedway connecting Schneider's new development with the Commonwealth Convention Center (owned by the Commonwealth of Kentucky) (deposition of Governor, p. 36, q. 94) (Tr. pp. 19-22).

The Governor told Russell McClure, his Secretary of Finance from April, 1976, through July, 1978 (Tr. p. 65) (hereinafter referred to as McClure) that the garage was to be adjacent to the Convention Center, north of the Convention Center, in the block of Third, Fourth, Main and Market Streets (deposition of Governor, p. 45) (Tr. pp. 65-68, qs. 3-8). McClure in-

structed the architects, Messrs. Weis and Nolan, and Mr. Clark Beauchamp, Commissioner of Facilities Management (hereinafter referred to as Beauchamp), that the garage would be built in the block of Third, Fourth, Main and Market Streets and attached to the Convention Center by pedway because those were the instructions of the Governor (Tr. p. 137, Exhibits #19, #22, #23, #24, #25, #26, #29, and #30).

At the Urban Renewal (UR) meeting April 29, 1977 (Tr. pp. 23-24, 27), Schneider referred to a deal with State Government to build the garage upon the west end of the block bounded by Main, Market, Third and Fourth Streets, including Petitioners' property. He said the garage must not be built elsewhere because it could not then connect his project by a walkway to the Commonwealth Convention Center, that he had told the Governor several months ago that he would not touch Riverfront unless a garage and office building was built at the site selected by him. He said he could start promptly on Riverfront, but intended to hold off until the garage controversy was settled, and he would cancel the whole Riverfront project if the garage was not built or was built in an inconvenient site. His ultimatum was, "*It's this simple, they either want a Riverfront or they don't.*" The Courier-Journal & Louisville Times published the remarks of Schneider (Tr. pp. 236-239; pp. 256-257) (emphasis added).

UR, by resolution, delivered land for his new project to Schneider with the stipulation that he had the approval rights of the site for the garage, etc.; and if he did not approve of the site, then his money (except

for five percent deposit) was refundable (Tr., Exhibit #9, par. 10).

Minutes of UR meeting of April 29, 1977:

> He submitted his check to the Agency for $425,000 which is the balance of the money necessary for the purchase price of the entire site. *He had one reservation, which the Commission approved, and that was he would not build on a site known as Shippingport Square, if the State did not build their garage in a satisfactory location to him in the block bounded by 4th, 3rd, Main and Market. There was a general discussion concerning this and THE BOARD BY RESOLUTION CONCURRED IN DELIVERING LAND TO MR. SCHNEIDER WITH THE STIPULATION THAT HE HAD THE APPROVAL RIGHTS OF THE SITE FOR THE GARAGE, ETC., AND IF HE DID NOT APPROVE THE SITE THEN HIS MONEY WAS REFUNDABLE WITH THE EXCEPTION OF THE NORMAL FIVE PERCENT DEPOSIT.* Motion was made by Mr. Triplett and seconded by Mrs. Reynolds approving the above. Voting was unanimous. (Emphasis added)

The deal was expressed in writing by the contract of sale, Urban Renewal to Schneider (the redeveloper) dated June 8, 1977 (Tr., Exhibit #2, p. 5):

> It is understood between the parties, as reflected in the minutes of the Agency dated April 29, 1977, that *the Redeveloper's final commitment hereto is predicated upon commitment for construction by the Commonwealth of Kentucky, or an agency*

thereof, of a parking garage and elevated pedestrian walkway connecting the Project with the Commonwealth Convention Center and SAID PARKING GARAGE IN A MANNER SATISFACTORY TO THE REDEVELOPER: . . . (Emphasis added)

At the Urban Renewal meeting held February 2, 1978, Schneider repeated the substance of his deal and stated that when the State broke ground for the garage, he would then be ready to commence Riverfront. McClure was present and said that the State hoped to break ground in June, 1978. McClure also requested Urban Renewal to formally contract to act as the agent of the State to purchase the property Market to the south, Main to the North, along Fourth Street. McClure stated that if the individuals would not sell, then the State would take the property by eminent domain (Tr. p. 75).

Paragraph 1 and 2 of the minutes of the Urban Renewal meeting held February 2, 1978 (Tr., Exhibit 12, p. 1, 2) reads:

1. Final approval of plans for Mr. A. J. Schneider's development of the office-hotel apartment complex to be built on the Shippingport Square tract of land bounded by Third, Fourth and Main Streets and River Road. Mr. Schneider presented to the Board his final development plans and a model of what he proposes to develop and gave a detailed description of his proposal. *He also stated that when the State breaks ground for the garage that he will then be ready to begin his development. Mr. Russell*

McClure, State Secretary of Finance and Administration stated that the State hopes to break ground in June. Motion was made by Mrs. Reynolds and seconded by Mrs. Byck approving the above. Voting was unanimous. Mayor William B. Stansbury also voted yes.

2. *Request by the State for the Urban Renewal and Community Development Agency to acquire the property for the new Commonwealth Parking Garage for the State and handle the relocation. Mr. Russell McClure, State Secretary of Finance and Administration made the request for the Urban Renewal Agency to enter into a contract with the State to negotiate with the property owners for the property market to the south, main to the north, along Fourth Street, back to Bensinger's for the State's parking garage, and to do the relocation work and other work necessary to acquire the site for the State. Mr. McClure stated that if negotiations with an individual property owner could not be worked out, then the State would use its right of eminent domain to buy the property. The State is hopeful that ground can be broken by June.* . . . (Emphasis added)

The garage did not originally include plans for a state office building, September, 1978 (Tr. p. 70, q. 15; Exhibit #4). However, the requirements of the Federal Environmental Protection Act would not permit a garage for more than 750 cars at that location (Tr. p. 173, q. 10). The problem was stretching a parking structure limited to 750 cars from Fourth and Market to Fourth and Main to support a pedway connecting

Convention Center to Schneider's Riverfront project. The solution—add a state office building on the northeast corner of Fourth and Main.

On February 7, 1978, Mr. Don Johnston, Executive Director of the Fair Board, appeared at a joint meeting of the Executive Committees' Appropriations Committee of the General Assembly. He asked that they provide 22½ million dollar bond authorization for the Fair Board, 8½ million of which was to be for the garage and office building. The office building would be approximately 65,000 square feet. When challenged by a member, he stated that the purpose of the office building would be to encourage the use of the Convention Center and downtown generally by providing space for Louisville Central Area, Chamber of Commerce, tourists' bureaus and other quasi-government entities (Tr. pp. 151-152; R. p. 110).

On March 29, 1978, the bond authorization requested by the Fair Board was approved (Kentucky Budget 1978-1980).

On May 18, 1978, the Fair Board approved the preliminary design and requested the architect to proceed with the project (Tr. Exhibit #31).

On May 26, 1978, Beauchamp approved a fee of $303,000 to the architect for their services on the project (Tr. Exhibit #22), the same architect who was doing Riverfront for Schneider (Tr. p. 42).

On May 31, 1978, the architect (Tr., in Paragraph 14 of Exhibit #23) pointed out that the Commonwealth Convention Center had not been planned for installation of a pedway at Fourth and Market Streets.

The Finance Department, by its letter dated August 3, 1979, directed, *at the expense of the Commonwealth,* its consulting engineers:

> . . . to proceed in providing additional survey information for the location of utilities, power poles, street lights, and other items for an area of Main Street extending from the proposed State Office Building to the property of Mr. Al Schneider on the north side of Main Street.
> (Tr. Exhibit #38)

McClure took leave of absence and resigned from State Government effective December 1, 1978. He went to work immediately thereafter as a consultant to Schneider (Tr. p. 51).

On April 11, 1979, the Finance Department requested Johnston to forward a letter of acceptance and approval of the garage, aka Parking Structure II (Tr. Exhibit #41, penultimate paragraph).

On August 22, 1979, Johnston wrote the Governor's Office that the State Fair Board would not be responsible for the State Office Building because:

> . . . it would exceed the Fair Board's proposed bond issue for capital improvements by seven million dollars plus the fact that the operation and responsibility for the office building is not in keeping with the functions and programs of the Fair Board.
> (Tr. Exhibits #32 and #37)

Johnston testified that the then projected costs of the garage, aka Parking Structure II, was 15½ million dollars (Tr. p. 156-157).

Governor Carroll (deposition of Governor, p. 8), McClure (Tr. pp. 90-91), and Beauchamp (Tr. pp. 173, 191-197, qs. 69-85) testified that the garage, aka Parking Structure II, was of size and located at site recommended by SUA, Inc. (1977) (Tr., Exhibit #39), and Voorhees Studies (1975) (Exhibit #40; Tr. p. 283, qs. 46).

The SUA, Inc. Study (Tr. Exhibit #39, pp. 5-14) recommended that the Commonwealth build an office building of 203,000 square feet at or adjacent to the site of the State Office Building presently located at Sixth and Cedar Streets, Louisville, Kentucky, some blocks away from the site selected by Schneider.

The Voorhees Study, which was entitled, "Parking Demand Analysis, Commonwealth Convention Center, Louisville, Kentucky," (Tr., Exhibit #40, p. 34 and fig. 2-3) recommended the site of the State parking garage be east of the Hyatt Hotel, far from the site selected by Schneider.

The Commonwealth of Kentucky, at Schneider's behest, entirely disregarded the recommendations (203,000 square feet at Sixth and Cedar Streets, adjoining and connected to the existing State Office Building) of the SUA, Inc. Study in favor of building a 98,000 square foot building (Tr. p. 131, q. 46) at Fourth and Main Streets. Contrary to the Voorhees Study, the Executive Branch never considered any site for the garage except along the western side of the block bounded by Third/Fourth, Main/Market Streets, all at Schneider's behest (deposition of Gov-

ernor, p. 27, q. 65; p. 29, q. 71; pp. 44-45, qs. 122-124; p. 47, q. 131).

All of the Governor's horses and all of the Governor's men marched to the foregone conclusion, which was that Parking Structure II, despite the studies, would be s-t-r-e-t-c-h-e-d with a pedway along the western side of Fourth Street "in a manner satisfactory" to Schneider.

The course of conduct of the Commonwealth of Kentucky, its employees, Chief Executive Officer, and Schneider prove a unity of purpose with a common design and undertaking to deprive Petitioners of their right, (1) to own property, and (2) to be free from the exercise of arbitrary power.

The raison d'etre for the garage and office building at the site demanded by Schneider is to make his properties, like the Hyatt Regency to the south of the Commonwealth Convention Center, connect by pedway to the Convention Center. *The Commonwealth of Kentucky, in accordance with the deal, restricted the site to that selected and demanded by Schneider.*

The public use was purported, but not actual. The primary purpose of this attempted taking is for private use, and any public use resulting therefrom is merely incidental.

FEDERAL QUESTIONS RAISED

The Petitioners, in the courts of first instance raised the Federal questions of Fifth Amendment and due process by their answers (Commonwealth v. M. R.

Yudofsky & Associates, R. 41-43, and Commonwealth v. Morris R. Yudofsky & Associates, R. 31-33). Petitioner advised the trial court in their opening statement (Commonwealth v. M. R. Yudofsky & Associates, Tr. 9 and 10) that those rights had been violated, and in their brief before the same court made the same contention. Petitioner raised those same contentions by Motion for Summary Judgment (Commonwealth v. Morris R. Yudofsky & Associates, R. 65-67).

Petitioners, in their Statement of Appeal and briefs (original brief, reply brief, petition for rehearing), all before the Court of Appeals of Kentucky, raised and argued those Federal questions.

Petitioner, in its Motion for Discretionary Review (p. 13 thereof) to the Supreme Court of Kentucky, stated, "Movant is being deprived of its property in violation of the Kentucky Constitution and Amendments 5 and 14 of the United States Constitution."

In Commonwealth v. M. R. Yudofsky & Associates, the trial judge, in its Findings of Fact and Conclusions of Law contained in the Appendix hereto, held that:

> The proposed parking garage will be constructed and operated by the Commonwealth of Ky. under the auspices of the State Fair Board for the primary benefit of the Commonwealth Convention Center and amounts to a valid public use.
>
> The proposed parking garage remains within the original proposals as to purpose and use unhindered by whatever action is ultimately taken in regard to the proposed state office building.

In Commonwealth v. Morris R. Yudofsky & Assoc., the trial judge, since retired, entered the Interlocutory Order (R. pp. 11-12) without an evidentiary hearing. The successor trial judge entered a final judgment (appendix hereto) providing that possession would remain in the Petitioner until its appeal was the subject of an appellate ruling; the Court of Appeals of Kentucky, in its Opinion (not to be published) (Appendix hereto), concluded that it was bound by the findings of the lower court unless they were clearly erroneous; and after examining the evidence, it could not find that the lower court was clearly erroneous. It specifically held:

> Consultation between private enterprise and government to effect for the common good is not evil, per se, and should be encouraged as long as there is no abuse.

The Supreme Court of Kentucky, by its Order entered March 2, 1982, denied Petitioners' Motion for Discretionary Review (Appendix hereto).

ARGUMENT

The writ should be allowed because:

1. The trial judge (Commonwealth v. M. R. Yudofsky & Associates, Tr. Vol. II, pp. 276-278, q. 24) erroneously thought that *KRS 247.140(2), Functions of Fair Board,* created a presumption in favor of the condemnor's decision:

THE COURT: The case law says the court can take judicial knowledge. In most instances the property owners oppose the State taking their property to put a highway over it, but, so what. The remedy is, the constitutional mandate is, as far as that goes, that they receive just compensation for the property taken, *but that doesn't stop the State from taking it.*

(Emphasis added)

Only *KRS 177.081, Authority of bureau of highways to condemn land and materials; title to property; conclusiveness of official order,* provides that when the Bureau of Highways has designated the location of a highway, its order "shall be conclusive of the public use" and "the condemnor's decision as to the necessity for taking the property will not be disturbed in the absence of fraud, bad faith, or abuse of discretion." *There are no such presumptions in KRS 247.140 (Fair Board).*

Both *KRS 177.081* (Highway Department) and *KRS 247.140* (Fair Board) were enacted by the same session of the Kentucky Legislature and both effective the same date, June 19, 1976. *It is obviously significant that the Legislature saw fit to arm the Highway Department with the presumption of validity of public use and site selection and deny such presumption to takings initiated for the benefit of the Fair Board.*

The trial court erroneously relied upon highway department cases (Findings of Fact and Conclusions of Law dated December 10, 1979, in Appendix). The

Findings of Fact and Conclusions of Law of the trial court were clearly erroneous.

2. Under the United States Constitution, Amendments 5 and 14, the Petitioners should prevail.

In the process of Respondent bartering away Petitioners' property, Schneider, with no status other than that of a private individual, was delegated "approval rights" as to the site of Parking Structure II. This is illegal because:

It constituted an illegal delegation to Schneider of power which is vested solely in the Commonwealth and which may not be delegated to a private individual, that is, the determination as to which private individual's property must be surrendered to the Commonwealth.

Eminent domain is an attribute of sovereignty and may not be delegated to a private individual, as was done here.

See *Washington* v. *Roberge,* 278 U. S. 116, 123, 49 S. Ct. 50, 73 L. Ed. 210 (1928).

3. THE COURTS IGNORED THE ONLY DECISION ON POINT.

REEL v. *CITY OF FREEPORT,* Ill., 209 N. E. 2d 675 (1965), IS ON "ALL FOURS" WITH THE CASE AT BAR.

Compare the facts:

Reel v. *Freeport*	*Kentucky* v. *Yudofsky*
1. City of Freeport to sell its parking lot to Montgomery Ward.	1. Schneider to buy Fourth and Main Streets from Urban Renewal.
2. Montgomery Ward to erect a large retail store.	2. Schneider to build hotel, apartments and offices at Fourth and Main instead of Sixth and Main.
3. City of Freeport would acquire Reel's property across the street from Ward's new store.	3. Kentucky would acquire Yudofsky's property and others along western side of Fourth Street in straight line from Fourth and Main to Commonwealth Convention Center.
4. City of Freeport would own and use Reel's property as a City parking lot.	4. Kentucky would use property as parking garage and office building to accommodate straight line pedway from Schneider's Fourth and Main project to Commonwealth Convention Center.

The holding was that the facts plead were an abuse of discretion. Neither the Opinion of the trial court nor that of the Court of Appeals have addressed the only case cited directly and squarely in point.

4. The State may not deprive owners of their property and compel a jury trial on value unless the condemnation is for a public use.

5. Where, as here, the condemnation power is exercised in a way that benefits a specific and identifiable private interest, the court should inspect with height-

ened scrutiny the claim that the public use is the predominant interest being advanced.

6. The rightfulness of these takings has been and still is a question of great public interest and wide publicity. *KRS 247.140(2)* does not create a presumption in favor of the condemnor's decision as to public use or site selection. Publication of an opinion safeguarding the right of persons to own property will help restore confidence in government.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Opinion of the Court of Appeals of Kentucky.

Respectfully submitted,

EDWIN L. COHEN
COHEN & COHEN
335 West Market Street
Louisville, Kentucky 40202
(502) 584-8177
Counsel for Petitioners

May 25, 1982

APPENDIX

PAGE

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Diagram 51

OPINION RENDERED: SEPTEMBER 4, 1981; 200 P.M.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 80-CA-230-MR

M. R. YUDOFSKY & ASSOCIATES
A Kentucky Partnership - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF FINANCE,
CLIFFORD A. HARROD, D/B/A
DECANTER BAR,
RUDY F. BOUTEILLER and
LOUELLA PERSON - - - - - - - *Appellees*

Appeal from Jefferson Circuit Court
Honorable Richard A. Revell, Judge
Action No. 79-CI-01265

AND: **No. 81-CA-537-MR**

MORRIS R. YUDOFSKY & ASSOCIATES,
A Kentucky Partnership - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF FINANCE - - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable Olga S. Peers, Judge
Action No. 79-CI-01270

AFFIRMING

BEFORE: GANT, GUDGEL and REYNOLDS, Judges.

GANT, JUDGE. This was an action by the Commonwealth of Kentucky, Department of Finance, seeking to acquire property including property of the appellant pursuant to the condemnation statutes, for the purpose of constructing a parking garage in Louisville, to be used in conjunction with the Commonwealth Convention Center and a state office building. Appellants contend that their property is not being taken for public purpose, nor is the area blighted or deteriorated. After a three-day trial, numerous exhibits, exhaustive but not exhausting depositions, the lower court entered its interlocutory judgment herein, granting the Commonwealth its right to immediate possession. This judgment was ruled appealable by the Supreme Court of Kentucky and we turn now to the merits of the case.

The thrust of the argument of the appellant is that the exercise of the power of condemnation in this case was arbitrary and made in bad faith. This is predicated upon an alleged scheme between Al J. Schneider and Honorable Julian Carroll, then governor of the Commonwealth, which scheme appellant contends had the effect of allowing Mr. Schneider to select the site for the proposed garage. The evidence herein discloses that Mr. Schneider was planning to construct an apartment building at the corner of Sixth and Main Streets. Officials of state and local governments had long felt that lack of parking and insufficient hotel rooms were a deterrent to adequate and profitable use of the Convention Center, which was far from a thriving operation. Several meetings were held between the governor, Mr. Schneider, the mayor, various planners and others, to discuss the general plans for and construction in a large area of downtown Louisville. Included in these plans was the construction of a pedway, an enclosed walk-

way, which would connect various buildings and facilities over a large area, extending some five or six blocks in the north and south direction and laterally to other facilities, including the parking garage in this labyrinth. As a result of several discussions, some of which were between the governor and his people and Mr. Schneider, the latter, who operates the Galt House, a large hotel which would be connected by the pedway, agreed to alter his plans to construct an apartment complex at Sixth and Main to construct a hotel at Fourth and Main. This change was made contingent upon a commitment by the state that it would construct its parking garage at Fourth and Market.

After conclusion of the hearing and consideration of the exhibits and evidence previously described, the lower court made its findings of fact, which included:

1. The site selected for the proposed garage, at the northeast corner of Fourth and Market Streets, was not dictated or determined by Mr. Al J. Schneider but was made by the proper state officials in the ordinary course of their duties. Mr. Schneider may have given advice to the Governor or other government officials when so requested but he did not initiate the location for the garage nor was there anything sinister, illegal or improper in the discussion between the Governor and Mr. Schneider, and the state's ultimate determination to construct the parking garage at said site.

2. The site selected for the proposed garage was not made arbitrarily, capriciously, in bad faith, for the direct private gain of any government official nor was said site selected by the Commonwealth with a total disregard for all relevant factors.

3. The proposed parking garage will be constructed and operated by the Commonwealth of Kentucky under the auspices of the State Fair Board for the primary

benefit of the Commonwealth Convention Center and amounts to a valid public use.

The Court is bound by the findings of the lower court unless they are clearly erroneous. CR 52.01. *Allen* v. *Arnett*, Ky., 525 S. W. 2d 748 (1975). After examining the evidence herein and considering the excellent, interesting and entertaining arguments of the appellant, we cannot find that the lower court was clearly erroneous. Consultation between private enterprise and government, to effect a plan for the common good, is not evil, per se, and should be encouraged as long as there is no abuse.

It seems obvious that a parking garage to serve state-owned facilities as well as the general public is, indeed, a public use. *Miller* v. *City of Georgetown*, Ky., 191 S. W. 2d 403 (1945). Nor is it fatal that some property will benefit more than others. *Sturgill* v. *Commonwealth, Department of Highways*, Ky., 384 S. W. 2d 89 (1964).

The judgment in 80-CA-230-MR is affirmed. Because of this affirmation and the unpublished opinion of the Supreme Court of Kentucky in this case, the judgment in 81-CA-537-MR is also affirmed.

ALL CONCUR.

Attorney for Appellant:

EDWIN COHEN
335 West Market Street
Louisville, Kentucky 40202

Attorneys for Appellees:
Clifford A. Harrod:

MICHAEL R. GREENE
730 West Main Street
Louisville, Kentucky 40221

Pro Se:

RUDY F. BOUTEILLER
LOUELLA PERSON
329 West Market Street
Louisville, Kentucky 40202

Department of Finance:

DOMINICK G. CALVE
Dept. of Transportation
P. O. Box 21178
Louisville, Kentucky 40202

HENRY C. GERMAN
P. O. Box 469
Covington, Kentucky 41012

JACK M. LOWERY, JR.
231 South Fifth Street
Louisville, Kentucky 40202

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 80-CA-230-MR

M. R. YUDOFSKY & ASSOCIATES
A Kentucky Partnership - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY,
Department of Finance; et al. - - *Appellees*

Appeal from Jefferson Circuit Court
Honorable Richard A. Revell, Judge
Action No. 79-CI-01265

AND **No. 81-CA-537-MR**

MORRIS R. YUDOFSKY & ASSOCIATES,
a Kentucky Partnership - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY,
Department of Finance - - - - *Appellee*

ORDER DENYING PETITION FOR REHEARING

BEFORE: GANT, GUDGEL and REYNOLDS, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is DENIED.

ENTERED: NOVEMBER 25, 1981

(s) Charles H. Reynolds
Judge, Court of Appeals

SUPREME COURT OF KENTUCKY

81-SC-899-D
(80-CA-230-MR & 81-CA-537-MR)

M. R. YUDOFSKY & ASSOCIATES, ETC., A KENTUCKY CORPORATION - - - - - - - *Movants*

v.

COMMONWEALTH OF KENTUCKY, DEPARTMENT OF FINANCE;
CLIFFORD A. HARROD, d/b/a DECANTER BAR;
RUDY F. BOUTEILLER and
LOUELLA PERSON - - - - - *Respondents*

Jefferson Circuit Court
#79-CI-01265 & #79-CI-01270

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion of M. R. Yudofsky & Associates, Etc., A Kentucky Corporation for a review of the decision of the Court of Appeals is denied.

ENTERED March 2, 1982.

(s) John S. Palmore
Chief Justice

JEFFERSON CIRCUIT COURT

DIVISION FOUR (4)

No. 79CI01265

COMMONWEALTH OF KENTUCKY, DEPARTMENT OF FINANCE - - - - - - - *Plaintiff*

v.

MORRIS R. YUDOFSKY AND ASSOCIATES, Et Al. - *Defendant*

FINDINGS OF FACT AND CONCLUSIONS OF LAW — Filed December 10, 1979

FINDINGS OF FACT

The Commonwealth of Kentucky, Department of Finance filed this action seeking to acquire the defendants' property by condemnation said land being sought for the use and benefit of the Kentucky State Fair Board for the purpose of developing and maintaining a parking garage near to the new Commonwealth Convention Center. The defendant Morris R. Yudofsky and Associates, a partnership, filed its answer denying that the condemnation of its property was for a public use or in the public interest, necessity and convenience and further that the taking of said property was arbitrary and capricious, or in bad faith or an abuse of discretion. The defendant Rudy J. Bouteiller filed his answer which does not contest the right of the Commonwealth to take the land in question. The third defendant Clifford A. Harrod filed an entry of appearance.

The Commonwealth then filed a motion for the entry of an interlocutory judgment granting it the right of immediate possession, and following numerous hearings during the course of the summer and early fall involving such matters as the right of the defendant Yudofsky to take the deposi-

tion of Governor Julian Carroll, the propriety of said defendant taking the deposition of Al J. Schneider, a Louisville developer, all of which the court permitted, the case ultimately came on for trial before the court sitting without a jury upon the issue of the right of the State to take the public property. The trial consumed nearly three days and resulted in the filing of over forty exhibits. From the voluminous evidence presented the court makes the following findings.

The redevelpment of Downtown Louisville has been a matter of great concern for many years involving the time and energy of numerous City, County and State officials in conjunction with the private business sector operating in Downtown, and organizations such as the Louisville Chamber of Commerce, Louisville Central Area Inc., the Governor's Advisory Council, and other organizations. The primary target area of the governmental officials of the City and County was Fourth Street, from Broadway extending north to the River front, upon the theory that the redevelopment of the core of the City should ultimately result in the resurgence of surrounding areas and a revitalization of all Downtown Louisville. In 1970 the Kentucky General Assembly in KRS Chapter 107 enacted legislation enabling the City of Louisville to reconstruct Fourth Street from Broadway to Market Street as a pedestrian mall with financing to be borne by those properties affected and in 1971 the Louisville Board of Aldermen following a series of public hearings proceeded with legislation to accomplish said result between Broadway and Liberty Street in Action No. 155454 styled *The City of Louisville and Louisville Central Area Inc.* v. *The Starks Building Company.* This court wrestled with the constitutionality and propriety of said legislation, ultimately upholding it in all but one provision, and the Fourth Street Mall was thereafter constructed by Al J. Schneider & Associates Inc.

In the same time span various plans were being bantered about for redevelopment of the area generally referred to as the Riverfront; and the several remaining blocks between the northern termination of the Fourth Street Mall at Liberty Street and the Riverfront property, which is generally regarded as between Main Street and the Ohio River, and between generally Third Street and Sixth Street. The name Shippingport has been used generally to describe part or all of the Riverfront area, but apparently has no specifically defined boundaries. The redevelopment of the Riverfront properties lay dormant for several years, with the exception of the construction of the Galt House Hotel by Home Supply Company Inc. of which Al J. Schneider is president, and the Louisville Trust Building constructed by the Louisville Trust Bank, and a Belvedere which runs to and extends out over the river. The redevelopment of the area along Fourth Street between Liberty and Main likewise lay dormant with the general exception of construction of the First National Tower by the First National Bank and the remodeling of Greater Louisville First Federal Savings and Loan Association building, neither of which is actually on Fourth Street, but are within a half block or so of Fourth Street. The Commonwealth of Kentucky, sensitive to the plight of Downtown Louisville and in an effort to participate in the efforts to revitalize the downtown area eventually constructed a convention center known as the Commonwealth Convention Center in the block between Jefferson and Market Streets, facing on Fourth Street. And, a new hotel, the Hyatt Regency, was constructed between Liberty and Jefferson between Third and Fourth Streets.

Mr. Al J. Schneider had obtained, in addition to the tract upon which the Galt House was built, a tract of land at Sixth and Main Streets upon which he contemplated constructing a high rise apartment building. In 1976, Gov-

ernor Julian Carroll, apparently because of Mr. Schneider's reputation for undertaking projects in the Downtown area while other developers took a more cautious approach, requested and obtained a meeting in Louisville with Mr. Schneider, during which the Governor requested Mr. Schneider to switch his building plans from Sixth and Main to Fourth and Main Streets, and from an apartment building to a hotel. In the course of their conversation during lunch the Governor requested Mr. Schneider's view regarding the near failure of the Commonwealth Convention Center to which Mr. Schneider replied that the obvious reason was a lack of adequate parking. There is a considerable conflict in the testimony as to what then occurred. The defendant Yudofsky contends that Mr. Schneider in effect prevailed upon the Governor to build a parking garage at the northeast corner of Fourth and Market Streets (on property owned by the defendants herein) with a pedway connecting the parking garage with the new proposel hotel to be constructed by Mr. Schneider at Fourth and Main. Mr. Schneider's position, and the position of the Commonwealth, is that the Governor proposed the parking garage and pedway, and that Mr. Schneider simply agreed to build the new hotel upon that understanding. The court is inclined to accept the Commonwealth's position, because there is considerable proof that a parking garage had long been proposed somewhere within the perimeters of the block between Third, Fourth, Market and Main, and a pedway had been proposed connecting many of the new buildings, including the new First National Tower, and the Greater Louisville First Federal Building with the Commonwealth Convention Center so that their parking facilities could be utilized by patrons of the Convention Center, it being apparent that no one parking facility would be sufficient to accommodate a capacity crowd attending the Convention Center. In fact, the pedway has been proposed

to extend all the way down Fourth Street to Stewart's, located at Fourth and Walnut Streets some several blocks away. The purpose of the pedway, which is nothing more than an enclosed walkway above the streets, is for pedestrian safety and to insulate those using the pedway from the elements, as an additional encouragement for people to again utilize Downtown facilities.

The plans for the proposed parking garage were drawn up by architects employed by the Commonwealth, and after the various reviews attendant to a facility of this magnitude were eventually adopted, and the project was placed under the jurisdiction of the State Fair Board, which ultimately submitted to the General Assembly and obtained a bond issue for $22½ million of which 8½ million was earmarked for the construction of the proposed parking garage and a proposed state office building to be used to house agencies or individuals whose purpose would be the promotion of the use of the Commonwealth Convention Center and secondly the stimulation of Downtown Louisville. The state office building was originally envisioned at around 60,000 square feet but through changes and additions has now been enlarged to approximately 98,000 square feet, at a proposed cost in excess of the original estimates. The State Fair Board at a meeting duly held concluded that the purpose of the new proposed state office building was not within the general purposes of the State Fair Board and disclaimed jurisdiction of said project. However, the Fair Board took no such action in regard to the proposed parking garage, being of the opinion that such facility is in keeping with the functions of its agency and it therefore intends to construct and operate the parking garage around which this controversy centers.

Considerable testimony was presented regarding the feasibility of the site selected by the State for the proposed parking garage, the Commonwealth's testimony supporting

the position that the site selected is the best location; the defendant's proof being that better alternate sites are available. With all due respect to the defendant's opinion that better sites are available the court is not convinced that the site selected by the Commonwealth for the proposed parking garage is totally without merit or was made arbitrarily or capriciously.

Additionally and more specifically the court finds:

1. The site selected for the proposed garage, at the northeast corner of Fourth and Market Streets, was not dictated or determined by Mr. Al J. Schneider but was made by the proper State officials in the ordinary course of their duties. Mr. Schneider may have given advice to the Governor or other governmental officials when so requested but he did not initiate the location for the garage nor was there anything sinister, illegal or improper in the discussion between the Governor and Mr. Schneider and the State's ultimate determination to construct the parking garage at said site.

2. The site selected for the proposed garage was not made arbitrarily, capriciously in bad faith, for the direct private gain any governmental official nor was said site selected by the Commonwealth with a total disregard for all relevant factors.

3. The proposed parking garage will be constructed and operated by the Commonwealth of Kentucky under the auspices of the State Fair Board for the primary benefit of the Commonwealth Convention Center and amounts to a valid public use.

4. The proposed parking garage remains within the original proposals as to purpose and use unhindered by whatever action is ultimately taken in regard to the proposed state office building.

CONCLUSIONS OF LAW

The defendant raised three issues, essentially

(1) That Al Schneider and not the State made the selection for the site of the proposed parking garage for Schneider's benefit.

(2) That the selection of the site was arbitrary, capricious, and not in good faith, and

(3) That the taking is not within the purpose of the State Fair Board nor within the property allotment enacted for said project.

The first two issues can be discussed together. It appears to the court that the proposal that Mr. Schneider switch building sites was initiated by the Governor in a good faith attempt to get things moving on the Riverfront development. Obviously, Mr. Schneider is a good enough businessman, and the court is not foolish enough to believe that Mr. Schneider did not make inquiries into the State's plans when the Governor requested that he (Schneider) build a hotel at Fourth and Main. The hotel would be in direct competition with Mr. Schneider's other hotel, The Galt House, and it would take an uncautious businessman to rush in and build a second hotel without some assurances as to ultimate plans for the area. But assuming for the sake of argument that Mr. Schneider did agree to build a new hotel at Fourth and Main only if the State would construct a parking garage at Fourth and Market, this fact would not invalidate the right of the Commonwealth to acquire the defendant's property by eminent domain. Granted a private person cannot condemn his neighbor's property for some excessively private or personal use nor may the Commonwealth do for a private person and for a private business what said person may not do for himself. See *Sturgill* v. *Commonwealth, Department of Highways*, Ky., 384 S. W. 2d 89 (1964).

However the fact that a private person gains by virtue of a public project does not invalidate the Commonwealth's right to take. As stated in Sturgill:

> "Any public way naturally confers a special benefit on those persons whose property adjoins it. All roads terminate somewhere. Dead end streets or highways inevitably and particularly subserve the private interests of the last property owner on the line. Yet the public has an interest in reaching other members thereof. As a practical matter, the right of condemnation for highway purposes could not be made to depend upon the predominance of the public interest over private benefit. This is too fine a line even for legal draftsmanship. If this consideration were a determining factor, the condemnor would endlessly be forced to 'battle in every county courthouse.' See *Commonwealth Dept. of Highways* v. *Burchett*, Ky., 367 S. W. 2d 262, 266. The accepted test is whether the roadway is under the control of public authorities and is open to public use, without regard to private interest or advantage."

An even stronger case against the defendants' position is *Baxter* v. *City of Louisville*, 224 Ky. 604, 6 S. W. 1074 (1928) wherein the City of Louisville sought to condemn (ironically) property on the Riverfront for the purpose of constructing a wharf which it intended to lease out to private businesses with the expectation of attracting new industry to the City of Louisville. The appellate court upheld the City's right to take, stating:

> "The expediency of constructing a particular public improvement and the extent of the public necessity therefor are clearly not judicial questions; but it is obvious that if property is taken in the ostensible be-

half of a public improvement which it can never by any possibility serve, it is being taken for a use that is not public, and the owner's constitutional rights call for protection by the courts." 10 C.L. 184, § 159.

"If the use for which property is taken is public, it is immaterial whether the power of eminent domain is to be exercised by a private or by a municipal corporation, or even by the state itself; but in a case in which the questions whether the use is public is close, the courts are inclined to be more liberal if the agency is public." 10 R.C.L. 34, § 30.

Kentucky's highest Court determined nearly 35 years ago that there is sufficient public purpose involved in the government providing off street parking to permit condemnation for a public parking facility. In *Miller* v. *City of Georgetown*, Ky., 191 S. W. 2d 403 (1945) the Court stated:

"Is then the acquisition and use of land by the city for a parking lot a municipal purpose? As said by the court in Nourse v. City of Russellville, 257 Ky. 525, 78 S. W. 2d 761, 764, when speaking of the powers of a municipality: 'The prime function of these units of government is to promote the safety, convenience, comfort, and the common welfare of their citizens by establishing and maintaining those things which tend to do so and by regulating or promoting those things which are harmful.'

"It is a matter of common knowledge that the great increase in recent years of motor vehicles has created a situation, even in the smaller cities, which is fraught with danger to persons using the streets and causes inconvenience to the residents of the city. Under the power to regulate the use of vehicles on their streets,

> cities may, and frequently do, prohibit parking on the streets in congested areas, and we think the right to furnish parking space is a necessary adjunct to the right to regulate traffic, otherwise it would be impossible to achieve the general objectives of the statutory grant of power to regulate the use of streets by vehicles. One of the main objectives is the protection and safety of the citizens. . . .
>
> . . . .
>
> We have no doubt that furnishing a parking lot for automobiles constitutes a legitimate municipal purpose."

It is thus apparent that the power to condemn for a parking facility exists. And it appears that the pedway and the parking garage will be maintained by the Commonwealth for the public, and the fact that Mr. Schneider may indirectly derive some benefit thus becomes irrelevant under the holding of *Sturgill, Supra.*

As for the contention by the defendants that a better site for the parking garage exists, that also is irrelevant under the case law. As stated in *Commonwealth* v. *Burchett,* Ky. 367 S. W. 2d 262 (1963) at p. 266:

> "The judicial power of government should not be invoked against the discretion of an agency of the executive branch in determining what is in the public interest, including what particular property is needed in connection with a valid public project, unless there is such a clear and gross abuse of that discretion as to offend the guaranty of Const. Sec. 2 against the exercise of arbitrary power."

This court can well appreciate the plight of the defendants, as it does with any landowner faced with the imminent

loss of their land, but this court cannot in good conscience state that there has been such a clear and gross abuse of discretion upon the Commonwealth's part as to constitute the exercise of arbitrary power. As this court sees it, the situation amounts to nothing more than Governor Carroll taking an active leadership role in getting the Riverfront project moving, by prevailing upon Al J. Schneider, a developer with a reputation for willingness to take a gamble and success in such ventures, to build at a location vital to giving impetus to the project; and Mr. Schneider making inquiry and seeking assurances as to the intended use of the adjoining property, just as any good businessman would do. And the government also is entitled to the use of good business practice and judgment, as stated in *Com., Dept. of Highways* v. *Trimble*, Ky., 451 S. W. 2d 641 (1969) at p. 644. While the defendant, faced with the loss of its land, understandably looks for and sees through its eyes a surreptitious deal, this court, sees only the exercise of good business judgment. In any event, the proposed parking garage is a legitimate governmental purpose, is to be operated and maintained by the Commonwealth for the use of the general public, and hence the Commonwealth has by virtue of eminent domain the right to acquire the subject property, and the Commonwealth is entitled to immediate possession.

Accordingly the plaintiff's motion for the entry of an Interlocutory Judgment should be sustained and said Judgment signed and entered.

(s) Richard A. Revell
Richard A. Revell, Judge

December 10, 1979

cc: Mr. Dominick G. Calve
Attorney for Plaintiff

Mr. Edwin Cohen
Mr. Louis Cohen
Attorneys for Defendants

Mr. Michael R. Greene
Attorney for Defendant Harrod

Mr. William H. Cull
Attorney for Governor Carroll

Mr. Rudy F. Bouteiller
Ms. Louella Person

JEFFERSON CIRCUIT COURT

FOURTH DIVISION

No. 79CI01265

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF FINANCE - - - - *Plaintiff*

v.

MORRIS R. YUDOFSKY AND ASSOCIATES
CLIFFORD A. HARROD d/b/a DECANTER BAR
RUDY F. BOUTEILLER
LOUELLA PERSON - - - - - - - *Defendants*

INTERLOCUTORY ORDER AND JUDGMENT —
Entered December 11, 1979

Upon examining the record herein, the Court finds:

(1) That all the parties hereto are before the Court; and that the Defendants have questioned the Plaintiff's right and authority to condemn the land and materials in questions.

(2) That the Plaintiff under the provision of KRS 416.550 - 416.670 is entitled to condemn the lands and materials hereinafter described.

(3) That the Report of Commissioners conforms to the provisions of KRS 416.580.

(4) It is, therefore, ordered and adjudged that the Plaintiff may take possession of said land and materials for the purpose set forth in the Petition upon the payment of the amount awarded by the Commissioners ($75,000.00) to the Defendants or to the Clerk of this Court.

(5) It is further ordered and adjudged that if no exceptions are filed within thirty (30) days from the date of this judgment, Felix J. Sanders, the Master Commissioner of this Court, shall execute a deed conveying the title to the lands and materials as described in the Petition and incorporated herein by reference, to the Plaintiff in conformity with this judgment.

(6) It is further ordered and adjudged that the Plaintiff takes hereby fee simple title to Parcel No. 193.

(7) It is further ordered and adjudged by this Court that the owners of the property herein shall vacate the same and deliver full and complete possession of the property which is the subject of this litigation to the Plaintiff upon the payment of the Commissioners' Award herein to the Clerk of this Court and it is further ordered and the sheriff of the county is authorized and directed to evict said owners upon failure to vacate the property herein on or after the date of the payment of the compensation awarded by said commissioners. Said property owners shall pay all costs of said eviction and for which cost, execution shall issue. All other costs shall be paid by the Plaintiff.

Dated this 10th day of December, 1979.

(s) Richard A. Revell
Judge, Jefferson Circuit Court

JEFFERSON CIRCUIT COURT

FOURTH DIVISION

No. 79CI-01265

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF FINANCE - - - - *Plaintiff*

v.

M. R. YUDOFSKY & ASSOCIATES, et al. - - *Defendants*

ORDER — Entered December 17, 1979

Upon motion of Defendant, M. R. Yudofsky & Associates, and the Court being sufficiently advised, it is hereby ordered and adjudged that the "Interlocutory Order and Judgment," entered herein December 11, 1979, is hereby amended and modified as follows:

1) More than one claim for relief is presented in this action within the meaning of *Civil Rule 54.02.*

2) The final order styled, "Interlocutory Order and Judgment," entered herein on December 11, 1979, is a final judgment upon one, but less than all, of the claims for relief presented in this action, and it is hereby determined that said judgment is final and there is no just reason for delay.

3) Paragraph (7) of the "Interlocutory Order and Judgment," entered herein December 11, 1979, is hereby modified and amended in that possession will not be delivered to the Plaintiff until the Defendant has exhausted its constitutional right of appeal.

4) Overruled and deleted by Judge Revell.

Dated: December 17, 1979

(s) Richard A. Revell, Judge

JEFFERSON CIRCUIT COURT

ELEVENTH DIVISION

No.79CI01270

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF FINANCE - - - - *Plaintiff*

v.

MORRIS R. YUDOFSKY AND ASSOCIATES
PEOPLES INDUSTRIAL PLAN, INC. - - *Defendants*

INTERLOCUTORY ORDER AND JUDGMENT—
Entered January 21, 1979

Upon examining the record herein, the Court finds:

(1) That all the parties hereto are before the Court; and the Defendants have questioned the right and authority of the Plaintiff to take the lands and materials which is the subject matter of this action.

(2) That the Plaintiff under the provision of KRS 416.550 - 416.670 is entitled to condemn the lands and materials hereinafter described.

(3) That the Report of Commissioners conforms to the provisions of KRS 416.580.

(4) It is, therefore, ordered and adjudged that the Plaintiff may take possession of said land and materials for the purpose set forth in the Petition upon the payment of the amount awarded by the Commissioners ($325,000.00) to the Defendants or to the Clerk of this Court.

(5) It is further ordered and adjudged that if no exceptions are filed within thirty (30) days from the date of this judgment, Felix J. Sanders, the Master Commis-

sioner of this Court, shall execute a deed conveying the title to the lands and materials as described in the Petition and incorporated herein by reference, to the Plaintiff in conformity with this judgment.

(6) It is further ordered and adjudged that the Plaintiff takes hereby fee simple title to Parcel No. 190.

(7) It is further ordered and adjudged by this Court that the owners of the property herein shall vacate the same and deliver full and complete possession of the property which is the subject of this litigation to the Plaintiff upon the payment of the Commissioners' Award herein to the Clerk of this Court and it is further ordered and the sheriff of the county is authorized and directed to evict said owners upon failure to vacate the property herein on or after the date of the payment of the compensation awarded by said commissioners. Said property owners shall pay all costs of said eviction and for which cost, execution shall issue. All other costs shall be paid by the Plaintiff.

Dated this 21st day of Jan., 1980.

(s) R. Stephenson
Judge, Jefferson Circuit Court

JEFFERSON CIRCUIT COURT

ELEVENTH DIVISION

No. 79CI01270

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

MORRIS R. YUDOFSKY & ASSOCIATES - - *Defendant*

ORDER — Entered November 20, 1980

Upon motion of Defendant, Morris R. Yudofsky & Associates, and the Court being sufficiently advised:

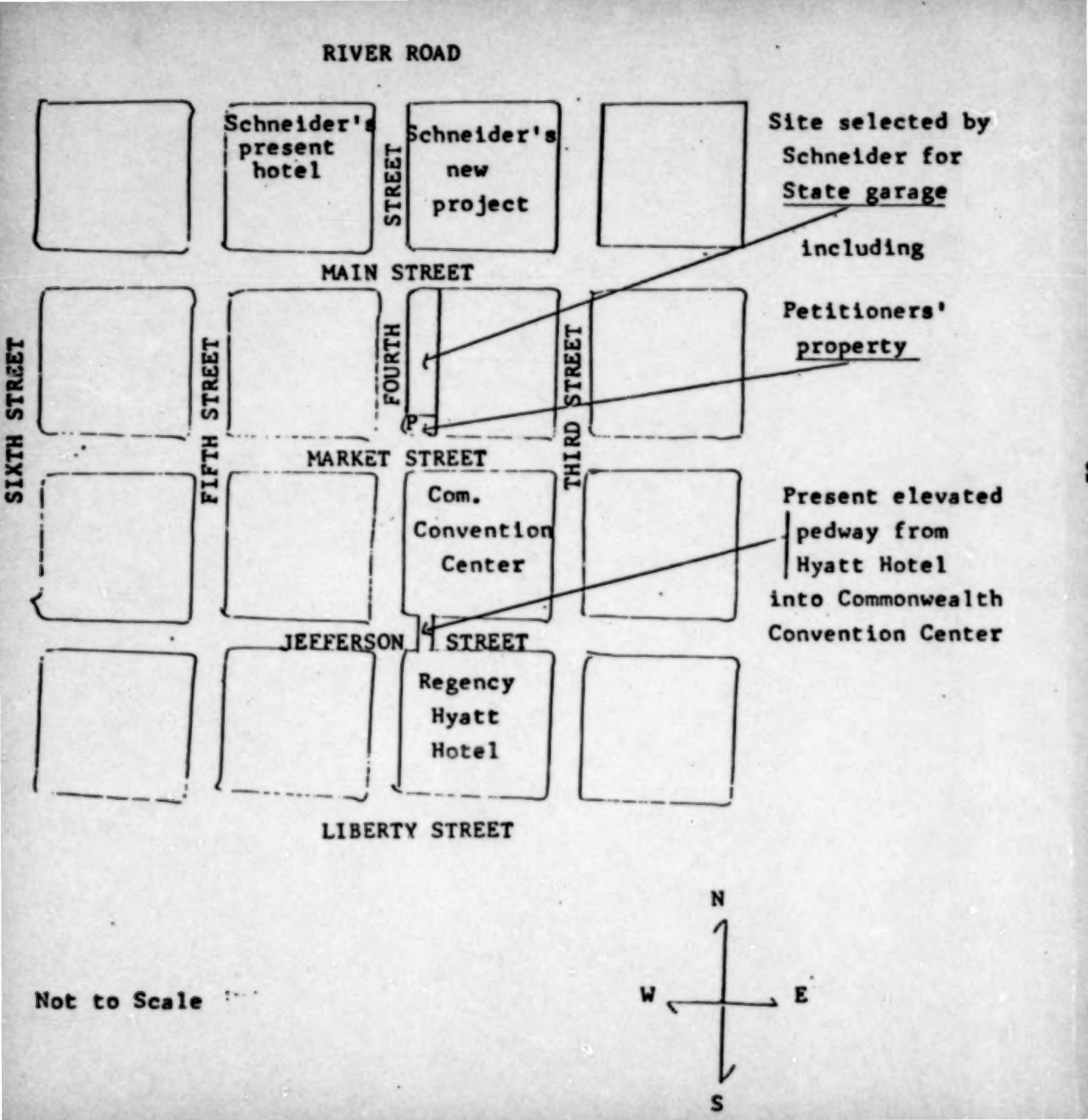
It is hereby ordered and adjudged that the Interlocutory Order entered herein January 21, 1980, is hereby amended and modified as follows:

1. More than one claim for relief is presented in this action within the meaning of Civil Rule 54.02.

2. The final order styled, "Interlocutory Order and Judgment," entered herein on Jauary 21, 1980, is a final judgment upon one, but less than all, of the claims for relief presented in this action, and it is hereby determined that said judgment is final, and there is no just reason for delay.

3. Paragraph (7) of the "Interlocutory Order and Judgment," entered herein January 21, 1980, is hereby modified and amended in that possession will not be delivered to the Plaintiff until the Defendant has exhausted its constitutional right of appeal.

(s) Olga S. Peers, Judge
Date: 11-20-80


RIVER ROAD
Schneider's present hotel
Schneider's new project
STREET
Site selected by Schneider for State garage including
MAIN STREET
Petitioners' property
SIXTH STREET
FIFTH STREET
FOURTH
THIRD STREET
P
MARKET STREET
Com. Convention Center
Present elevated pedway from Hyatt Hotel into Commonwealth Convention Center
JEFFERSON STREET
Regency Hyatt Hotel
LIBERTY STREET
N
W
E
S
Not to Scale

81-2186

No.

Office - Supreme Court, U.S.
FILED
JUN 28 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

M. R. YUDOFSKY & ASSOCIATES, a Kentucky Partnership, and
MORRIS R. YUDOFSKY & ASSOCIATES, another Kentucky Partnership - - Petitioners

versus

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF FINANCE - - Respondent

On Petition for a Writ of Certiorari
To the Court of Appeals of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION

A. STEPHEN REEDER
State Office Building
Frankfort, Kentucky 40622

HENRY C. GERMANN
P. O. Box 17180
Covington, Kentucky 41017
(606) 341-2705

Attorneys for Respondent
Commonwealth of Kentucky
Department of Finance

June 21, 1982

WESTERFIELD-GEOTE CO., 310 W. KENTUCKY-P.O. BOX 6305, LOUISVILLE, KY.

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Miller v. City of Georgetown, Ky., 191 S. W. 2d 403 (1945)	4
Sturgill v. Commonwealth, Department of Highways, Ky., 384 S. W. 2d 89 (1964)	4
KRS 247.140(2)	5
Reel v. City of Freeport, Ill., 209 N. E. 2d 675 (1965)	6, 7
KRS 416.610	7

IN THE

SUPREME COURT OF THE UNITED STATES

No._____

October Term, 1982

M. R. YUDOFSKY & ASSOCIATES, a Kentucky Partnership, and MORRIS R. YUDOFSKY & ASSOCIATES, another Kentucky Partnership - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY DEPARTMENT OF FINANCE - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

As set out in Petitioners' Appendix, pages 23-51.

JURISDICTION

Petitioners assert jurisdiction pursuant to 28 USC 1257. Respondent denies that jurisdiction is properly laid in this Court and denies that a substantial federal or constitutional issue is involved.

CONSTITUTIONAL PROVISIONS ASSERTED

Petitioners assert the application of the Fifth Amendment and the Fourteenth Amendment. Respondent denies their applicability.

STATEMENT OF THE CASE AND FACTS

The Petitioners in their Statement of the Case have injected as much argument as a recitation of the salient facts of this case such as to render it unacceptable as an accurate reflection of the chronological history of this dispute. However, the trial court in its Findings of Fact and Conclusions of Law has detailed a concise, unbiased account of the pertinent facts of this case and the Respondent directs the Court to Petitioners' Appendix, pages 32-37 for review of the trial court's account. The only other facts that should be added to the trial court's account is that the Kentucky Court of Appeals affirmed the trial court on or about September 4, 1981 and that the Kentucky Supreme Court found no merit in the Petitioners' Motion for Discretionary Review, said Order denying discretionary review entered on March 2, 1982.

REASONS FOR DENYING THE WRIT

The thrust of the Petitioners' argument and their claim of federal jurisdiction lies in their unfounded belief that they have been denied "due process of law" as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. De-

spite the Petitioners' laudible attempts at federal jurisdiction on the above basis, even the most cursory of glances at the record in this case completely disputes their contentions.

In simplest terms this action is a routine state condemnation case filed by the Respondent against the Petitioners in state court pursuant to the statutory authority of Kentucky Revised Statutes 416.570 to 416.660 wherein the Petitioners' land was needed as part of public improvement in Louisville, Jefferson County, Kentucky. The Petitioners, as is their right under these statutes (KRS 416.600), filed an Answer to the condemnation petition contesting the Respondent's right to take their property. Upon consideration of the Petitioners' Answer the trial court set the matter for trial on the sole question of the Respondent's right to take the Petitioners' property. The trial on this one question involved three days of testimony and the receipt of over forty exhibits by the Court. The trial court then deliberated and subsequently handed down an eleven page Findings of Fact and Conclusions of Law painstakingly detailing the issues and arguments of the parties and ruling that the project in question was for a public purpose and that the Respondent had the right to condemn.

The Petitioners then availed themselves of their constitutional right to appeal this decision to the Kentucky Court of Appeals. They presented their arguments both orally and by brief to that Court. After a review of the record and upon hearing arguments of counsel the Court of Appeals rejected the Peti-

tioners' contentions stating that the law of Kentucky is that an appellate court is bound by the findings of the lower court unless the lower court's findings are "clearly erroneous." (Kentucky Civil Rule of Procedure 52.01). See also *Allen* v. *Arnett,* Ky., 525 S. W. 2d 748 (1975). However, the Court of Appeals did not stop with that basic statement. It went further and reaffirmed the trial court's decision when it stated in its opinion:

> It seems obvious that a parking garage to serve state-owned facilities as well as the general public is, indeed a public use. *Miller* v. *City of Georgetown,* Ky., 191 S. W. 2d 403 (1945). Nor is it fatal that some property will benefit more than others. *Sturgill* v. *Commonwealth, Department of Highways,* Ky., 384 S. W. 2d 89 (1964). See Petitioners' Appendix, page 28.

Not satisfied with these affirmations of the Respondent's right to condemn the Petitioners sought review by the Supreme Court of Kentucky. Their Motion for Discretionary Review by the Supreme Court of Kentucky was denied by that Court without comment indicating to the Respondent that the Kentucky Supreme Court found no merit in the Petitioners' claims nor found the Kentucky law so onerous that it needed review and alteration.

Where in the record is there the denial of due process which the Petitioners claim is an affront to the United States Constitution? The Petitioners received an exhaustive three day trial on the singular

question of the Respondent's right to condemn their property. They were allowed to call any and all witnesses they desired and introduce whatever proof they deemed necessary to support their position. They submitted briefs and made their arguments to the trial court and the Kentucky appellate court without success. It is obvious to the Respondent that from copies of the trial court's Opinion and of the Kentucky Court of Appeals' affirmation of that Opinion that the Kentucky courts gave the Petitioners their "day in court." The Petitioners' real complaint is not with the manner or form of their treatment in the Kentucky courts, not a question of a denial of due process at all, but rather the same sad litany of most losers in the adversary system — a cry of foul because the final decision goes against them.

Although the Respondent believes the record on its face completely negates the Petitioners' claim of a denial of due process, the Respondent feels it appropriate to comment briefly on the Petitioners' various arguments for review of this case. Petitioners claim the trial court erred when it "thought that KRS 247.140(2), *Functions of Fair Board,* created a presumption in favor of the condemnor's decision:" (See Petitioners' Brief, page 17). Contrary to Petitioners' assertions this Respondent does not read in the trial court's findings any such presumptions. What this Respondent sees in the trial court's findings is that after three days of trial the trial court *found,* not presumed, that the project in question was for a public purpose. If the trial court cited highway condemna-

tion decisions as supportive of its findings this Court should not find that unusual as highway cases make up the bulk of eminent domain decisions in the Commonwealth of Kentucky.

The Petitioners second argument is that somehow the Respondent delegated its sovereign powers to a private individual and that this delegation constitutes a denial of due process to them. The trial court upon hearing all of the evidence and viewing the witnesses found no merit in this argument. (See trial court's Conclusions of Law, Petitioners' Appendix, pages 38 and 39). The trial judge, as the trier of fact, upon weighing the proof before him exercised that cherished descretion of a trier of fact, whether judge or jury, and found against the Petitioners' arguments. Is this Court or any appellate court ready to substitute its judgment for that of the trier of fact absent fraud or gross abuse of discretion? The Respondent thinks not!

Petitioners' third argument is that the Kentucky courts failed to follow an Illinois state court decision in deciding this Kentucky case. The Petitioners claim that the case of *Reel* v. *City of Freeport,* Ill., 209 N. E. 2d 675 (1965) is "on all fours" with the case at bar. However, the truth is that the *Reel* case has absolutely no logical relationship to this case. First, an Illinois authority has no bearing on a Kentucky condemnation case. Nevertheless, the case is easily distinguished from this one because the parking garage that was to be built in the Illinois case was for

the sole benefit of a department store. The sole beneficiaries of the parking garage in this action will be the Commonwealth Convention Center and the new State Office Building. In the Illinois case, the City of Freeport was by contract to sell their existing parking garage to Montgomery Ward and to condemn for a new city parking garage. Herein, no such arrangements are contemplated nor is any private individual being facilitated. Any parallels that could possibly be drawn between these two cases are necessarily strained.

In the *Reel* case, the complaint is that Reel did not get his day in court because the Circuit Court dismissed his claim. Herein, the Petitioners did have their day in court, therefore the case is wholly inapplicable to the case at bar. Why the final outcome of the *Reel* case is not given by the Petitioners is that the issue at bar was not before that Court.

The Petitioners last three arguments are really repetitions of their earlier argument concerning the public use or character of the project in question. It is the Respondent's belief that the trier of fact is in the best position to view the evidence and apply the appropriate law. In Kentucky, pursuant to statute, the trial court is given the authority to determine the legitimacy of a condemnor's right to condemn private property. (KRS 416.610). The Petitioners were given every opportunity to contest the nature and motive of the purported public project, but failed to present significant proof to convince the courts of their position. There has been no denial of due process here,

but only the continued and unmerited assaults of a defeated adversary. The Respondent believes this dispute was best described by the trial court in the last paragraph of his Conclusions of Law when he stated:

> While the defendant, faced with the loss of its land, understandably looks for and sees through its eyes a surreptitious deal, this court, sees only the exercise of good business judgment. In any event, the proposed parking garage is a legitimate governmental purpose, is to be operated and maintained by the Commonwealth for the use of the general public, and hence the Commonwealth has by virtue of eminent domain the right to acquire the subject property, and the Commonwealth is entitled to immediate possession. (See Petitioners' Appendix, page 42).

CONCLUSION

The Respondent submits that the record herein cleary reflects no denial of due process and, thus no constitutional issue is presented. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

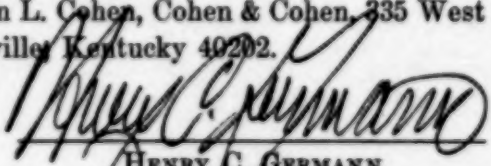
A. Stephen Reeder
State Office Building
Frankfort, Kentucky 40622

Henry C. Germann
P. O. Box 17130
Covington, Kentucky 41017
(606) 341-2705

Attorneys for Respondent
Commonwealth of Kentucky
Department of Finance

CERTIFICATE OF SERVICE

I, Henry C. Germann, counsel for Respondent, hereby certify that the attached Respondent's Brief in Opposition was served on Petitioners by depositing copies of the aforementioned document in the United States mail, first-class postage prepaid, on June 21, 1982, addressed to Petitioners' counsel, Edwin L. Cohen, Cohen & Cohen, 335 West Market Street, Louisville, Kentucky 40202.



HENRY C. GERMANN
Attorney for Respondent
Member, Bar of the Supreme
Court of the United States

Office - Supreme Court, U.S.
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No. 81-2186

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

M. R. YUDOFSKY & ASSOCIATES a Kentucky Partnership, and
MORRIS R. YUDOFSKY & ASSOCIATES, another Kentucky Partnership, - - Petitioners,

versus

COMMONWEALTH OF KENTUCKY, DEPARTMENT OF FINANCE, - - Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of Kentucky

REPLY BRIEF FOR PETITIONERS

EDWIN L. COHEN
COHEN & COHEN
335 West Market Street
Louisville, Kentucky 40202
(502) 584-8177
Counsel for Petitioners

July 2, 1982

WESTERFIELD-BONTE CO., 610 W. KENTUCKY—P.O. BOX 3591, LOUISVILLE, KY.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

REPLY BRIEF FOR PETITIONERS

May it please the Court:

The Respondent made an unfair and improper argument. It made a misleading statement of fact, Page 2 of its Brief in Opposition, namely:

> ". . . and that the Kentucky Supreme Court found no merit in the Petitioners' Motion for Discretionary Review . . . ," and

made an improper argument on Page 4 of its Brief, namely:

"Their Motion for Discretionary Review by the Supreme Court of Kentucky was denied by that Court without comment indicating to the Respondent that the Kentucky Supreme Court found no merit in the Petitioners' claims nor found the Kentucky law so onerous that it needed review and alteration."

To the contrary, the Kentucky Rules of Civil Procedure, *76.20(9)(a)* states:

"(9) Disposition of Motion.

(a) If the motion is denied the decision shall stand affirmed, and if a supersedeas bond has been executed, damages for delay shall be recoverable pursuant to KRS Chapter 26A. *The denial of a motion for discretionary review does not indicate approval of the opinion or order sought to be reviewed and shall not be cited as connoting such approval.*" (emphasis added)

Respectfully submitted,

EDWIN L. COHEN
COHEN & COHEN
335 West Market Street
Louisville, Kentucky 40202
(502) 584-8177
Counsel for Petitioners

July 2, 1982